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Supreme Court of the United States

OCTOBER TERM, 1942.

No. **1005**

W. K. ARCHER AND ERCELL G. WESTFALL, CO-
PARTNERS DOING BUSINESS AS W. K. ARCHER
AND COMPANY, PETITIONERS AND
APPELLANTS BELOW,

VS.

SECURITIES AND EXCHANGE COMMISSION,
RESPONDENT AND APPELLEE BELOW.

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE
EIGHTH CIRCUIT AND BRIEF IN SUPPORT
THEREOF.**

CARL V. RICE,
Kansas City, Kansas,
Counsel for Petitioners.

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PARTNERS DOING BUSINESS AS W. K. ARCHER
AND COMPANY, PETITIONERS AND
APPELLANTS BELOW,

VS.

SECURITIES AND EXCHANGE COMMISSION,
RESPONDENT AND APPELLEE BELOW.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable The Chief Justice and the Associate
Justices of the Supreme Court of the United States:

Your petitioners, W. K. Archer and ErCELL G. Westfall, co-partners, doing business as W. K. Archer and Company, in support of their Petition for a Writ of Certiorari to review the final judgment of the United States Circuit Court of Appeals for the Eighth Circuit, entered March 6th, 1943, affirming an order of The Securities and Exchange Commission, respectfully show:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This was a statutory proceeding by your petitioners in the United States Circuit Court of Appeals for the Eighth Circuit, to review an order of the Securities and Exchange Commission, who, after due hearing, revoked the registration of your Petitioners as brokers and dealers, and expelled them from the National Association of Securities Dealers, Inc., and the Chicago Stock Exchange. This order was entered June 13th, 1942. The Commission found your Petitioners guilty of various violations of the Securities Acts of 1933 and 1934, and the Circuit Court of Appeals decided that all the charges were sustained by sufficient evidence, and affirmed the above order on March 6th, 1943. Your Petitioners filed in said Court a motion for a rehearing, which was overruled on March 11th, 1943. The opinion of the Circuit Court of Appeals appears in 133 F. 2d 795 (Record 243).

B.

STATEMENT OF THE JURISDICTION OF THIS COURT.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, Ch. 229, Sec. 1, 43 Stat. 938 (28 U. S. C. A. 347.a), and under the same Act, Ch. 229, Sec. 8, 24 Stat. 940 (28 U. S. C. A. 350).

The Date of the Judgment to Be Reviewed.

The judgment of the Circuit Court of Appeals for the Eighth Circuit, affirming the order of the Securities and Exchange Commission was entered on March 6th, 1943, and a motion for rehearing was overruled on March 11th, 1943. This Petition, with supporting brief, and the certified record, are filed within three months next after the final judgment sought here to be reviewed.

**Statement of the Nature of the Case and the Rulings
Bringing the Case Within the Jurisdiction
of This Court.**

The nature of the case has been heretofore stated. The Circuit Court of Appeals ruled:

First: That the Commission's findings (R. 224) that your Petitioners willfully violated Section 15 (c) (1) of the Securities and Exchange Act, under these undisputed facts, was justified:

Petitioners purchased from another dealer one hundred shares of Dewey Portland Cement common stock. The dealer seller, a month after the purchase, was still unable to deliver the stock, which Petitioners had resold to a customer at a profit of \$75. Petitioners succeeded in obtaining a cancellation from their customer and on the same day notified the dealer by mail that such customer insisted on a \$300 cash settlement for the breach of contract. The dealer sent Petitioners that amount (Record 256).

Second: In answer to Petitioners' argument that the penalty inflicted by the Commission was too severe, as the offenses were venial and of the long past and should be modified by the Court, the Circuit Court of Appeals ruled that the penalty could not be so modified as it was within the powers conferred upon the Commission by the Congress (Record 259).

The jurisdiction of the Federal Court of this cause has not been questioned. Each of the rulings of the Circuit Court of Appeals is reviewable by this Court under the appropriate statutory provisions noted.

**Cases Believed to Sustain the Jurisdiction of This
Court.**

This Court is vested with jurisdiction under the statutory provisions heretofore specified. The cases submitted by Petitioners as the basis for the exercise of such jurisdiction, to review the judgment below, are cited here-

after in connection with Petitioners' reasons for the allowance of the Writ of Certiorari.

C.

THE QUESTIONS PRESENTED.

(1) Where a stock transaction between brokers fails of consummation because the seller is unable to deliver and has thereby incurred liability for his breach of contract, and the buying broker, using the mail for that purpose, falsely represents that his customer demands a stated sum as settlement for the nondelivery, which sum the seller remits to the buyer, is such action on the part of the buyer within the scope and purposes of Section 15 (c) (1) of the Securities Exchange Act? Or is it a matter of purely local concern, of State law and State action, and beyond Federal cognizance?

(2) Does the power given to the Circuit Court of Appeals by the Securities Act to modify any order of the Securities and Exchange Commission include power to modify the penalties imposed by the Commission?

D.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(1) In affirming the ruling of the Securities and Exchange Commission in the Dewey Portland Cement case (R. 224) that a misrepresentation made in connection with a settlement of damages for an admitted breach of an executory contract of sale of shares of stock, was a violation of the Securities Exchange Act (Section 15 (c) (1)) and was within the scope of Federal power, the Circuit Court of Appeals has decided an important question of law which has not been, but should be, settled by this Court, and has decided a federal question in a way prob-

ably in conflict with applicable decisions of this Court, to-wit:

Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197, 59 S. Ct. 206, 214, 83 L. Ed. 126.

National Labor Relations Board v. Jones, etc., Corp., 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893.

Adams v. U. S., 208 U. S. 101, 28 S. Ct. 277, 52 L. Ed. 436.

Railway Retirement Board v. Alton Ry. Co., 295 U. S. 330, 55 S. Ct. 758, 79 L. Ed. 1468.

(2) In ruling that the penalty imposed by the Securities and Exchange Commission may not be modified by the Circuit Court of Appeals that Court has decided an important question of law which has not been, but should be, settled by this Court?

CONCLUSION.

Each of the questions presented is of grave public importance. Unless the opinion below is reviewed the question whether Federal laws and Courts may act on matters, otherwise totally local in nature, upon the sole ground that they originated in matters of a Federal nature, will be left in confusion and doubt. So, also, is it important that the construction of the court review section of the Securities and Exchange Act be settled by this Court, so that all men may know whether the judgment of penalties imposed by the Securities and Exchange Commission is final, without regard to proper relationship between offenses and their punishment.

Wherefore, your Petitioners pray that a Writ of Certiorari issue under the Seal of this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the records and proceedings of said United States Circuit Court of Appeals in the case numbered and entitled on its docket

as Number 12329, *W. K. Archer and Ercell G. Westfall, co-partners doing business as W. K. Archer and Company, Petitioners, v. Securities and Exchange Commission, Respondent*, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment of said Circuit Court of Appeals be reversed by this Court; and your Petitioners pray that the certified copy of the record and proceedings of said United States Circuit Court of Appeals for the Eighth Circuit, filed with this petition, may be treated as a return to said Writ of Certiorari; and your Petitioners pray that they may have such other and further remedies as to the Court may seem appropriate and in conformity with law.

W. K. Archer,
Ercell G. Westfall,
Doing Business as W. K.
Archer and Company,
Petitioners.

CARL V. RICE,
Counsel for Petitioners.





SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

No.

W. K. ARCHER AND ERCELL G. WESTFALL, CO-
PARTNERS DOING BUSINESS AS W. K. ARCHER
AND COMPANY, PETITIONERS AND
APPELLANTS,

VS.

SECURITIES AND EXCHANGE COMMISSION,
RESPONDENT AND APPELLEE.

**BRIEF IN SUPPORT OF PETITION FOR WRIT
OF CERTIORARI.**

A.

OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals for the Eighth Circuit, filed February 15th, 1943, is a final judgment, and is published in 133 F. 2d 795 (Record 243).

B.

GROUND'S ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

These grounds appear as a part of the foregoing Petition for Writ of Certiorari, and are hereby adopted and made a part of this brief.

C.

STATEMENT OF THE CASE.

This statement also appears as a part of the foregoing Petition for Writ of Certiorari, and is adopted and made a part of this brief.

D.

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

(1) The Circuit Court of Appeals erred in sustaining the ruling of the Securities and Exchange Commission that a misrepresentation of fact, made by the buyer in connection with a settlement of damages for the breach of contract by the seller of securities, is within federal cognizance, and is within the purview of Section 15 (c) (1) of the Securities Act of 1934.

(2) The Circuit Court of Appeals erred in ruling that it cannot modify a final judgment of the Securities and Exchange Commission that cancels the registration of a broker and expels him from stock exchanges.

E.

SUMMARY OF THE ARGUMENT.**Point I.**

A misrepresentation of fact is not one made to effect a transaction in, or to induce the purchase or sale of, a

security, where it is made in an effort by the buyer to secure from the seller of securities damages for the latter's breach of contract to deliver. Such a misrepresentation is not of "federal" concern, but is purely a matter of local concern and law, and for local action.

Point II.

A misrepresentation of fact is not a fraudulent one where its only purpose and effect is to induce a person to pay his debts.

Point III.

A final and mandatory judgment by the Securities and Exchange Commission, revoking a broker's license, is such an "order" of the Commission as is reviewable and subject to modification, by the reviewing court, under Section 25 of the Securities Act of 1934.

ARGUMENT.

POINT I.

(a)

The conceded facts in the Dewey Portland Cement case are set out on page 224 of the Record. Here is shown a sale of stock that through the default of the seller, another broker, was never consummated. There remained to be recovered from the seller, by suit or settlement, the damages caused by the seller's default. The Statute (Section 15 (c) (1) of the Securities and Exchange Act) is directed against fraud that aims "to effect any transaction in or to induce the purchase or sale of any security." No fraud was here committed with the view of effecting or inducing any transaction in securities or sale or purchase of securities. The misrepresentation charged neither induced the contract nor its breach. It was made in connection with a settlement out of Court of a claim for damages for the breach. The Act does not purport to concern itself with such collateral matters, matters of purely local concern, of State law and State action.

If the Act covers a misrepresentation made in connection with a *peaceful* settlement of a claim as here, then also would it obviously cover a fraud committed in a state court in an action brought to *enforce* the claim. Surely, neither the Commerce clause nor the Acts passed under it contemplated federal action going into such labyrinths. "Commerce" simply is not involved here, and if the Act could be considered as covering the facts here, a grave question of its constitutionality would arise.

In *National Labor Relations Board v. Jones and Laughlin Corp.*, 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893, this Court (l. c. 30) said:

"That distinction between what is national and what is local in the activities of Commerce is vital to the maintenance of our federal system."

and again (l. c. 32):

"Whether or not particular action does affect Commerce in such a close and intimate fashion as to be subject to federal control * * * is left by the statute to be determined as individual cases arise. We are thus to inquire whether in the instant case the constitutional boundary has been passed."

In *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 59 S. Ct. 206, 83 L. Ed. 126, this Court (59 S. Ct., l. c. 214) said:

"The question whether the alleged unfair labor practices do actually threaten interstate or foreign commerce in a substantial manner is necessarily presented. And in determining that factual question regard should be had to all the existing circumstances, including the bearing and effect of any protective action to the same end already taken under state authority * * *. The justification for the exercise of federal power should clearly appear. But the question in such a case would relate not to the existence of the federal power but to the propriety of its exercise on a given state of facts."

In a case arising under this Securities and Exchange Act, a District Court in the State of New York (*Securities and Exchange Commission v. Torr*, 15 Fed. Supp. 315) said:

"To be sure, there is a limit to the control of both the mails and interstate commerce. Congress may not use either of these powers in an arbitrary manner, as to take away a right guaranteed to citizens by other provisions of the Constitution or to seize control of a matter purely local. *Adair v. U. S.*, 208 U. S. 161, 28 S. Ct. 277, 52 L. Ed. 436; *Hammer v. Dagenhart*, 247 U. S. 251, 38 S. C. 529, 62 L. Ed. 1101; *Railway Retirement Board v. Albany Ry.*, 295 U. S. 330, 55 S. Ct. 758, 79 L. Ed. 1468."

The glaring fact here is that no "sale" or "purchase" or "transaction" in stock was "induced" or "effected," no one sold, no one purchased. There was merely an untainted contract for the purchase and sale of stock, a contract that the seller breached. No action not clearly within the scope of Section 15 (c) (1) of the Act in question can be considered as a violation of it. As said in *Wright v. Securities and Exchange Commission*, 112 F. 2d 892:

"The Statute must be strictly construed since a violation of it may be punished as a crime."

POINT II.

Section 15 (c) (1) of the Securities Exchange Act deals with "manipulative, deceptive or other fraudulent device or contrivance." This means "fraud." A misrepresentation is not legally a fraudulent one where its only purpose and effect is to induce the performance of an existing obligation. The eastern broker, the Sheeline Company, had sold stock to Petitioners. Sheeline Company had sold "short." It could not deliver although Petitioners voluntarily gave it a month to "cover" the sale. No Dewey stock could be found wherewith to fill the contract. The Sheeline Company broke its contract and owed damages because of such breach. It owed such damages to *someone*. Whether it owed it to Petitioners or to someone else would be of no consequence; the validity, merit, value and extent of the claim would be the same whether owed to Petitioners or to a customer of Petitioners, real or fictitious. And the fact that the demand for \$300 was made by a supposed customer of Petitioners rather than by the Petitioners could, of course, in no way have influenced Sheeline action on the claim, or swell the amount it would pay in settlement. That Company knew what it was willing to pay to avoid court action. It was willing to pay the \$300. It was merely induced to do what it was under legal obligation to do.

"Fraud without damage or injury is not remediable."

26 C. J. 1167.

"Plaintiff may recover when he shows that he has sustained some pecuniary damage or injury by reason of having been put in a position worse than he would have occupied if there had been no fraud."

26 C. J. 1169.

"One suffers no damage where he is fraudulently induced to do something which he is under legal obligation to do, such as pay a just debt."

23 Am. Jur., p. 996.

In the leading case, *Fulton v. Head*, 34 Pa. 365, 75 Am. St. Rep. 670, the Court said:

"A party who seeks release from the obligation of his bond, on the ground of actual fraud or misrepresentation, must establish that there was a false representation of a matter of *substance*, *important to his interests*, and actually misleading him to his hurt" (Italics ours).

In *Deobald v. Opperman*, 111 N. Y. 531, 19 N. E. 94, the Court said:

"It is the very essence of an action of fraud or deceit that the same should be accompanied by damage, and neither *damnum absque injuria* nor *injuria absque damnum* by itself establishes a good cause of action. *Hutchins v. Hutchins*, 7 Hill 104. Neither can a party claim to have been defrauded who has been induced by artifice to do that which the law would have otherwise compelled him to perform. *Thomson v. Menck*, 41 N. Y. 82."

In *Musconetcong Iron Works v. Delaware, L. & W. Ry. Co.*, 78 N. J. L. 717, 76 Atl. 971, the Court said:

"* * * A person induced by false representations to do an act, which it was his duty to do, cannot be heard to say that he was prejudiced by such false representations."

In 26 C. J. 1168, the author says:

"Falsehood which causes no injury may be a moral but cannot be a legal wrong."

That the above is true is nowhere more clearly and decisively asserted than in the case of *Stratton Independence, Limited, v. Dines*, 135 Fed. 449 (8th Cir.). There, the Court said:

"Fraudulent representations and deceit, if not productive of injury or loss, are moral not legal wrongs. Fraud without damage, or damage without fraud, gives no cause of action."

This charge concerning the Sheeline settlement is only one of several charges against Petitioners that were sustained by the Commission and Court. If, however, error exists in sustaining this specific charge, then the error should be corrected, for this charge may have been the very charge that impelled the Commission to inflict the extreme penalty allowable by the Act.

POINT III.

The Court of Appeals refused to modify the severity of the penalty imposed by the Securities and Exchange Commission. This, on the stated ground that the penalty was within the power conferred upon the Commission. Such refusal is in line with the majority ruling in *Wright v. Securities and Exchange Commission*, 112 F. 2d 89 (2nd Cir.). We believe that in this case and likewise in the *Wright* case, sufficient consideration was not given to Section 25 (a) of the Securities Act of 1934 (15 U. S. C. A. 78Y). That section gives the Court of Appeals the exclusive power to review any "order" of the Commission at the request of any person aggrieved by such order. The reviewing Court is limited in passing upon the facts. If there be "substantial" evidence to support the Commission's findings of facts, then those findings may not be disturbed. As to "orders" of the Commission, however,

the Statute gives the reviewing Court full and exclusive power to affirm or modify or enforce or set aside, in whole or in part. In all the Acts creating administrative bodies, Congress has provided for judicial reviews of the proceedings of such bodies, either in a plenary action in equity as in the case of the Interstate Commerce Commission, or by direct and final review as in the case of the Act in question and in many others.

As said of this Act:

"Congress has provided within this Act the exclusive remedy for persons aggrieved by the operations of the act."

(*American Sumatra Tobacco Company v. Securities and Exchange Commission*, 93 F. 2d 236.)

This Section 25 of the Act empowers the Court of Appeals to modify *any* order by which the person affected by it considers himself aggrieved. Petitioners consider themselves aggrieved by an order that took from them not only their seats in the Stock Exchange and their broker's license, but even the right as dealers to deal in securities that they *own*. And they have asked the Court to exercise its discretionary power to modify this sentence, and temper the wind.

This expulsion and revocation of license was by an 'order' of the Commission, and is subject to modification like any other order of the Commission. Section 25 of the Act covers all orders, regardless of their nature. It was a final order, a judgment.

"It is part of an order, and the order is final, not tentative. It was entered as the result of a formal controversy, and it marked the disposition of the controversy, not a preliminary stage."

(*Alton Ry. Co. v. United States et al.*, 287 U. S. 229, 53 S. Ct. 124, 77 L. Ed. 275.)

"By an 'order' is meant some command of the Commission directing or restraining action or granting

or denying some form of relief. An 'order' is a mandate, precept, a command or direction authoritatively given * * *. An order of the Commission is analogous to the judgment of a court, and it is well settled that findings constitute no part of a judgment even though incorporated in the same instrument with it. * * * The judgment itself does not reside in its recitals, but in the mandatory portion."

(*Carolina Co. v. Federal Power Commission*, 97 F. 2d 435.)

In a case involving this Act, the Court modified an order of the Commission which would result in disclosures of petitioners' trade secrets. The Court ruled such order to be reviewable and set it aside, saying:

"We are not concerned here with an administrative ruling—but with action which operates particularly rather than general—with a judgment entered on a state of facts and affecting only one person."

(*American Sumatra Tobacco Co. v. Securities & Exchange Commission*, 93 F. 2d 236.)

The same Court later (*Aluminum Company v. Federal Power Commission*, 130 F. 2d 445) said of its opinion in the Tobacco case:

"We held that order in that case reviewable. We based our decision upon the proposition that property rights may not be put in jeopardy or destroyed in any proceeding before an administrative board without notice, hearing and judicial review, and we found nothing either in the language of the Act or in its legislative history to justify the conclusion that review of type of order in question was not contemplated."

There is, also, nothing in the Act or its legislative history to justify the view that the reviewing Court is powerless to modify an order—a judgment, that wipes out a man's hard won business and standing in the business world.

The Act (Section 25) makes no distinction between orders. All final, affirmative orders are included.

This Court has never passed upon this important question of law. It should be settled by it.

CONCLUSION.

There are presented here questions of grave public importance, of deep concern to the multitude that deal, as broker or customer, in securities. It would be well that this Court speak with final authority upon the matters presented.

Respectfully submitted,

CARL V. RICE,

Counsel for Petitioners.

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 1005

W. K. ARCHER AND ERCELL G. WESTFALL, COPART-
NERS DOING BUSINESS AS W. K. ARCHER AND
COMPANY, PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH
CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE
COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Eighth Circuit (R. 243) is reported in 133 F. (2d) 795. The opinion of the Commission (R. 211), not yet officially reported, is set forth in the Commission's Securities Exchange Act Release No. 3253. The order of the Commission (R. 227) revoked the registration of W. K. Archer and Company as a broker and dealer in securities and

expelled the Company from the National Association of Securities Dealers, Inc., and from the Chicago Stock Exchange.

JURISDICTION

The decree of the Circuit Court of Appeals was entered March 6, 1943 (R. 259), and rehearing was denied March 11, 1943 (R. 273). The petition for a writ of certiorari was filed May 6, 1943. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, the provisions of which are made applicable by Section 25 (a) of the Securities Exchange Act of 1934.

QUESTIONS PRESENTED

(1) Whether there was substantial evidence to support the Commission's findings that petitioner violated the Securities Act of 1933 and the Securities Exchange Act of 1934 by making false and misleading statements in its application to the Commission for registration as a broker and dealer, and by defrauding certain persons in the purchase and sale of securities.

(2) Whether the court below properly refused to question the remedy of expulsion and revocation adopted by the Commission pursuant to the authority contained in the Securities Exchange Act of 1934.

STATUTES INVOLVED

The pertinent provisions of the Securities Act of 1933, the Securities Exchange Act of 1934, and

the Commission's Rules and Regulations are set forth in the Appendix, *infra*, pp. 10-16.

STATEMENT

The Commission's proceeding was begun by a notice and order for hearing issued May 22, 1941 (R. 1-8). A hearing was held, briefs were filed, and oral argument was heard. On June 13, 1942, the Commission issued its opinion, findings, and order (R. 211-228). The findings of the Commission may be summarized as follows:

1. Petitioner, a partnership registered as a securities broker and dealer with the Commission, failed to disclose, in its application for registration, in response to a specific question concerning control of the business, the material fact that a certain Claude Westfall was a person controlling petitioner (R. 214-17). This failure was a violation of Section 15 (b) of the Securities Exchange Act of 1934, which provides that the registration of a broker-dealer may be revoked if the broker-dealer in its application for registration has willfully made false and misleading statements with reference to any material fact.

2. Petitioner defrauded investors by effecting purchases and sales of securities for those investors at prices deviating from the prevailing market prices (R. 217-19), in willful violation of Section 17 (a) of the Securities Act of 1933 and Section 15 (c) (1) of the Securities Exchange Act, which prohibit

the use of fraudulent or deceptive devices in securities transactions.

3. In three specific transactions petitioner defrauded customers in willful violation of Section 17 (a) of the Securities Act and Section 15 (c) (1) of the Securities Exchange Act (R. 219-24).

4. On a number of occasions petitioner violated the provisions of Section 7 (c) (2) of the Securities Exchange Act, and Regulation T thereunder, which pertain to the extension of credit by broker-dealers (R. 226).

The Commission concluded that it was necessary, in the public interest and for the protection of investors, to revoke petitioner's registration as a broker-dealer pursuant to Section 15 (b) of the Securities Exchange Act, and to expel petitioner from the National Association of Securities Dealers under Section 15A (1) (2) and from the Chicago Stock Exchange under Section 19 (a) (3) of that Act. On June 13, 1942, the Commission issued its order of revocation and expulsion (R. 227). The petition for review was filed June 16, 1942 (R. 229), and on February 15, 1943, the Circuit Court of Appeals handed down its opinion affirming the Commission's order (R. 243). A petition for rehearing was denied March 11, 1943.

ARGUMENT

Petitioner's brief suggests that the issues center on a particular transaction involving securities of

the Dewey Portland Cement Company. But, as appears from both the Commission's findings and the court's opinion, that transaction was but one of many violations found by the Commission; it was by no means the sole or even a principal basis for the Commission's order. The Circuit Court of Appeals held that every finding of the Commission was supported by substantial evidence. With one exception the petition does not controvert any of the violations which the Commission found petitioner had committed. These now unquestioned violations by themselves are sufficient to sustain the Commission's order.

In any event, the particular finding which the petitioner challenges, that relating to the Dewey Portland Cement transaction (R. 224), is based on facts clearly involving a violation of Section 15 (c) (1) of the Securities Exchange Act. The admitted facts are as follows (R. 190-196): Petitioner, to fill a securities order placed by a customer, contracted to purchase the securities from a dealer. The dealer was unable to deliver the securities and finally asked petitioner to "buy in" the securities and advise it of the cost of doing so. Although petitioner's customer cancelled his purchase order, petitioner on the same day represented to the dealer that the customer insisted upon the payment of \$300 to compensate him for nondelivery of the securities. Petitioner a few days later collected \$300 from the dealer and retained it. This transaction was

found to be a willful violation of Section 15 (c) (1) of the Securities Exchange Act and Rule X-15C1-2 promulgated thereunder, *infra*, pp. 12-13.

Petitioner argues that this transaction involved no "sale" or "purchase" of securities but only a contract of sale, said to be not within the Act, which in Section 15 (c) (1) deals with the use of fraudulent devices to "effect any transaction in, or to induce the purchase or sale of, any security." The argument fails for two reasons. First, it assumes that the Act cannot apply if the "contract of sale" was not consummated. But Section 15 (c) (1) covers a "transaction" as well as a sale, and it is clear that the settlement of a contract of sale of a security is either a separate transaction in a security or an integral part of the "effecting" of a "transaction" in a security. Certainly Congress must have intended to cover all of the normal incidents of broker-dealer transactions, which regularly extend to the settlement of contractual obligations in the event of failure to deliver the securities contracted for. Therefore, Section 15 (c) (1) embraces misrepresentations made in connection with and to induce the settlement of a securities contract, as well as misrepresentations made in order to induce customers to enter into a securities contract. Second, the argument overlooks the fact that Section 3 (a) (14) defines "sale" to include "any contract to sell or

otherwise dispose of," and Section 3 (a) (13) defines "purchase" as including "any contract to buy, purchase, or otherwise acquire." Petitioner's misrepresentation was related to both the original contract between petitioner and the dealer, and the "buy-in" contract between the same parties.

The petition argues that the dealer was not damaged and, therefore, not "defrauded" by this transaction. This contention is negated by the admitted facts. The dealer was induced by misrepresentation to pay to petitioner an amount greatly in excess of any reasonable claim which petitioner could have made against him.

2. Petitioner contends that the court below erred in refusing to question the remedy of expulsion and revocation as applied to the violations in which the petitioner engaged. The court stated: "The grounds of the complaint against the severity of the Commission's order have been considered, but the Commission has acted in that respect within the power conferred upon it by Congress" (R. 259).

We submit that the position taken by the court below is correct. The statute provides that certain misconduct on the part of a broker or dealer subjects him to revocation of his registration and to suspension or expulsion from certain exchanges and securities associations, if the Commission deems it in the public interest and for the protection of investors so to order. Sections 15A

(1) (2), 19 (a) (3), *infra*, p. 14. Whether the Commission should impose merely a suspension for twelve months or an expulsion from a national securities exchange, was a question which the Congress intended to be decided by the Commission in the light of the public interest and the protection of investors. Congress did not intend that this exercise of an administrative function be reexamined by the courts, except in a case where there is no rational basis for the Commission's action. *N. L. R. B. v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261; *N. L. R. B. v. Link-Belt Co.*, 311 U. S. 584.

Petitioner makes much of the authority granted in the statute to modify an order of the Commission. This power is not at all in conflict with the grant of discretion to the Commission as to the appropriate remedy. It merely provides authority to the courts to modify orders of the Commission when an erroneous rule of law has been applied and where the proper rule of law requires a different remedy than that applied by the Commission.

There is no conflict of decisions on this question. The only other case directly in point is in accord. *Wright v. S. E. C.*, 112 F. (2d) 89 (C. C. A. 2d); *id.*, C. C. A. 2d, April 3, 1943.

CONCLUSION

There is no conflict of decisions and the petition presents no question which warrants review by this Court. The petition should, therefore, be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

JOHN F. DAVIS,
Solicitor.

MILTON V. FREEMAN,
Assistant Solicitor.

THEODORE L. THAU,
IRVING R. PANZER,
Attorneys,

Securities and Exchange Commission.

MAY 1943.

APPENDIX

The Securities Act of 1933 (48 Stat. 74, 15 U. S. C. § 77a *et seq.*) provides in pertinent part:

Section 17 (a)

It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

The Securities Exchange Act of 1934 (48 Stat. 881, 15 U. S. C. § 78a, *et seq.*) provides in pertinent part:

Section 3 (a)

When used in this title, unless the context otherwise requires—

* * * * *

(13) The terms "buy" and "purchase" each include any contract to buy, purchase, or otherwise acquire.

(14) The terms "sale" and "sell" each include any contract to sell or otherwise dispose of.

Section 7 (c) (2)

It shall be unlawful for any member of a national securities exchange or any broker or dealer who transacts a business in securities through the medium of any such member, directly or indirectly to extend or maintain credit or arrange for the extension or maintenance of credit to or for any customer—

* * * * *

Without collateral or on any collateral other than exempted securities and/or securities registered upon a national securities exchange, except in accordance with such rules and regulations as the Federal Reserve Board may prescribe (A) to permit under specified conditions and for a limited period any such member, broker, or dealer to maintain a credit initially extended in conformity with the rules and regulations of the Federal Reserve Board, and (B) to permit the extension or maintenance of credit in cases where the extension or maintenance of credit is not for the purpose of purchasing or carrying securities or of evading or circumventing the provisions of paragraph (1) of this subsection.

Section 15 (b)

* * * The Commission shall, after appropriate notice and opportunity for hearing, by order deny registration to or revoke the registration of any broker or dealer if it finds that such denial or revocation is in the

public interest and that (1) such broker or dealer whether prior or subsequent to becoming such, or (2) any partner, officer, director, or branch manager of such broker or dealer (or any person occupying a similar status or performing similar functions), or any person directly or indirectly controlling or controlled by such broker or dealer, whether prior or subsequent to becoming such, (A) has willfully made or caused to be made in any application for registration pursuant to this subsection or in any document supplemental thereto or in any proceeding before the Commission with respect to registration pursuant to this subsection any statement which was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact; or (B) has been convicted within ten years preceding the filing of any such application or at any time thereafter of any felony or misdemeanor involving the purchase or sale of any security or arising out of the conduct of the business of a broker or dealer; or (C) is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security; or (D) has willfully violated any provision of the Securities Act of 1933, as amended, or of this title, or of any rule or regulation thereunder.

Section 15 (c) (1)

No broker or dealer shall make use of the mails or of any means or instrumentality of interstate commerce to effect any trans-

action in, or to induce the purchase or sale of, any security (other than commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, by means of any manipulative, deceptive, or other fraudulent device or contrivance. The Commission shall, for the purposes of this subsection, by rules and regulations define such devices or contrivances as are manipulative, deceptive, or otherwise fraudulent.

(The Commission's Rule X-15C1-2, promulgated pursuant to Section 15 (c) (1), provides:

(a) The term "manipulative, deceptive, or other fraudulent device or contrivance," as used in Section 15 (c) (1) of the Act, is hereby defined to include any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

(b) The term "manipulative, deceptive, or other fraudulent device or contrivance," as used in Section 15 (c) (1) of the Act, is hereby defined to include any untrue statement of a material fact and any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, which statement or omission is made with knowledge or reasonable grounds to believe that it is untrue or misleading.

(c) The scope of this rule shall not be limited by any specific definitions of the term "manipulative, deceptive, or other fraudulent device or contrivance" contained in other rules adopted pursuant to Section 15 (c) (1) of the Act.

Section 15A (1) (2)

The Commission is authorized, if such action appears to it to be necessary or appropriate in the public interest or for the protection of investors or to carry out the purposes of this section—

* * * * *

After appropriate notice and opportunity for hearing, by order to suspend for a period not exceeding 12 months or to expel from a registered securities association any member thereof who the Commission finds (A) has violated any provision of this title or any rule or regulation thereunder, or has effected any transaction for any other person who, he had reason to believe, was violating with respect to such transaction any provision of this title or any rule or regulation thereunder, or (B) has willfully violated any provision of the Securities Act of 1933, as amended, or of any rule or regulation thereunder, or has effected any transaction for any other person who, he had reason to believe, was willfully violating with respect to such transaction any provision of such Act or rule or regulation.

Section 19 (a) (3)

The Commission is authorized, if in its opinion such action is necessary or appropriate for the protection of investors—

* * * * *

After appropriate notice and opportunity for hearing, by order to suspend for a period not exceeding twelve months or to expel from a national securities exchange any member or officer thereof whom the Commission finds has violated any provision of

this title or the rules and regulations thereunder, or has effected any transaction for any other person who, he has reason to believe, is violating in respect of such transaction any provision of this title or the rules and regulations thereunder.

Section 25 (a)

Any person aggrieved by an order issued by the Commission in a proceeding under this title to which such person is a party may obtain a review of such order in the Circuit Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the Court of Appeals of the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, and enforce or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is

material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, and enforcing or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

